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SUPREME COURT, U.S.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1978

No. 78-777

UNITED STATES OF AMERICA,
Petitioner

v.

KEITH CREWS,
Respondent

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Pursuant to Rule 53, paragraph 7 of the Rules of this Court, respondent requests leave to file his Opposition to the Government's Petition for a Writ of Certiorari to the District of Columbia Court of Appeals without prepayment of costs and to proceed In Forma Pauperis.

AFFIDAVIT

I, Silas J. Wasserstrom, being first duly sworn, depose and say in support of the Motion to Proceed In Forma Pauperis:

1. I am co-counsel for Respondent in the above-referenced matter and am a member of this Court.

2. Respondent was represented by court-appointed counsel from the Public Defender Service in this matter. I was appointed by the D.C. Court of Appeals to serve as Respondent's counsel at the appellate level.

3. Respondent is indigent and thus cannot pay the costs of this case, nor can he give security for the same.

Silas J. Wasserstrom
Silas J. Wasserstrom

Public Defender Service
451 Indiana Avenue, N.W.
Washington, D.C. 20001
628-1200

Subscribed and Sworn to by me
this 17th day of January, 1979.

Michelle J. Tucker
Notary Public, D.C.

Commission Expires January 31, 1983

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IN THE
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UNITED STATES OF AMERICA,

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KEITH CREWS,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE
DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF FOR RESPONDENT IN OPPOSITION

SILAS J. WASSERSTROM

W. GARY KOHLMAN

Public Defender Service
451 Indiana Avenue, N.W.
Washington, D.C. 20001
628-1200

Counsel for Respondent

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OPINION BELOW

The en banc opinion of the District of Columbia Court of Appeals is reported at 389 A.2d 277 (1978). It is reproduced as appendix A to the Petition.

JURISDICTION

The judgment of the District of Columbia Court of Appeals was entered on June 14, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the lower court was correct in excluding identification evidence which was the fruit of purposeful and flagrant police misconduct designed to obtain precisely that evidence.

STATEMENT

The respondent adopts the petitioner's statement of facts.

ARGUMENT

This is not an appropriate case for review by this Court. The District of Columbia Court of Appeals, sitting *en banc*, applied an unexceptional doctrine to a narrow and unusual set of facts. ^{1/} Its well-reasoned opinion is neither far reaching nor novel, and its analysis of the applicable legal principles is cogent, correct, and carefully tailored to the facts of the case before it. Indeed, contrary to the government's contention that its opinion conflicts with "several principles and lines of analysis" of this Court, the Court of Appeals' analysis followed precisely and perspicuously the guidelines which this Court has set forth in a series of decisions from Weeks v. United States, 232 U.S. 383 (1914); through Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920); Nardone v. United States, 308 U.S. 338 (1939); Wong Sun v. United States, 371 U.S. 471 (1963); Brown v. Illinois, 422 U.S. 590 (1975); United States v. Ceccolini, 435 U.S. 268 (1978).

The essence of the lower court's opinion is simply that where the police make a purposeful and illegal investigatory arrest specifically designed to secure the suspect's photograph for possible identification by the complainant, the deterrent rationale which underlies the exclusionary rule very well may -- and on the facts of this case indeed did -- require the exclusion of all subsequent identification evidence obtained as a result of that initial illegal arrest. ^{2/} The petitioner's

^{1/} Respondent adopts petitioner's statement of the question presented and recitation of the facts.

^{2/} The Court of Appeals' opinion several times repeats the theme that the exclusionary rule must be applied in this case because the police illegality was designed to obtain the very fruit now at issue. The very narrowness of that holding is a sufficient response to the petitioner's assertion that the opinion's rationale could apply "in every case that a court may later find the arrest to have been for some reason unlawful." Petitioner's petition at 10.

challenge to this conclusion is premised on two propositions, the first of which is not of sufficient importance to warrant certiorari review, ^{3/} and the second of which this Court effectively rejected just last term.

First, the government contends, the lower court was simply wrong in concluding that this particular in-court testimony was a fruit of the police illegality, though at times its argument seems to be that such testimony is never in fact a fruit. But at all events, the petitioner does not argue that in its analysis of this issue the Court of Appeals ignored the salient factors. Indeed, it could not; for the court below assiduously applied precisely the factors which this Court elucidated in Brown v. Illinois, *supra*. Consequently, the petitioner's complaint is, simply, that the court below accorded these factors different relative weight than the petitioner would like. Such a narrow issue is not worthy of review by this

^{3/} The petitioner argues that one reason for granting review in this case is that there is a "conflict" in the circuits on the question of whether in-court identification testimony can ever be the fruit of an illegal arrest. That alleged "conflict" is more asserted than demonstrated and, in any event, is not pertinent to this case.

In the first place, all of the cases cited by petitioner holding that in-court identification testimony was not a fruit of police misconduct were decided before Ceccolini, *supra*. They all seem premised on the notion that live testimony can never be the fruit of official misconduct, no matter how flagrant. This notion was dispelled by this Court's opinion in Ceccolini, *supra*. Moreover, to the extent that different courts, reviewing unique facts, have reached varying conclusions on the question of attenuation only reinforces respondent's argument that this is hardly an appropriate case for this Court's review. Indeed, one of the cases holding on a record analytically indistinguishable from the instant case that in-court identification testimony was a fruit of official misconduct has been cited with approval by this Court. United States v. Edmons, 432 F.2d 577 (2d Cir. 1970) (cited with approval in Brown v. Illinois, *supra*, 422 U.S. at 604, n.9)

(footnote cont'd on next page.)

Court; it is conceptually equivalent to a challenge to a finding of probable cause or no probable cause, wherein all the parties agree on the controlling principles, but disagree only on their application to the particular facts. Moreover, respondent submits, the weight accorded these factors by the court below was eminently reasonable.

As the court below pointed out, the Brown opinion "injected precision into the process of assessing attenuation," by delineating three factors which should be considered in determining whether evidence challenged as the fruit of police misconduct should be excluded. Those factors are: (1) the "temporal proximity" of the illegality to the alleged fruits, (2) "the presence of intervening circumstances," and (3) most significantly, "the purpose and flagrancy of the official misconduct." 422 U.S. at 603, 604.

Petitioner here concedes that there is a close "temporal proximity" between the illegality and the fruit. Petition at 18. As the Court of Appeals observed, the time from the illegal arrest to the in-court identification was "quite a brief period in the context of the criminal justice process," and, moreover, the illegality did not end on the arrest date but "tainted" the entire process." Petition at 39a.

(footnote 3 cont'd)

In any event, this case does not present the Court with an opportunity to resolve an arguable "conflict" in the circuits. Rule 19(1)(b) of the Supreme Court Rules, in setting forth considerations governing review on certiorari, discusses situations where "a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter. . . ." The District of Columbia Court of Appeals, however, is the equivalent of the highest court of a state, not of a federal court of appeals. Palmore v. United States, 411 U.S. 389 (1973).

The Court of Appeals then went on to consider whether there were "intervening circumstances" that might have attenuated the illegality, and persuasively distinguished Johnson v. Louisiana, 406 U.S. 356 (1972), on the ground that, unlike in Johnson, the illegally obtained evidence here was itself the basis for the allegedly intervening judicial determinations.

In Johnson, the illegality was related to the challenged fruit of it in only the most tenuous "but for" causal sense. The police had probable cause to arrest the defendant for crime A, but because the arrest was made in his home, it was arguably illegal because they had not secured an arrest warrant. After Johnson's arrest a magistrate found probable cause to hold him and ordered him to stand in a lineup. The magistrate's probable cause determination was not based on any illegally seized evidence. Johnson was identified at the lineup by a witness to crime B, and he contended that this lineup identification should have been suppressed as a fruit of the warrantless arrest for crime A.

This Court understandably rejected Johnson's claim, ruling that the alleged fruit -- the lineup identification -- was attenuated from the illegality by the "intervening circumstance" of the magistrate's probable cause determination and his lineup order. As the Court of Appeals noted below, the magistrate's finding of probable cause occurred after the arguable police misconduct. At the point of the lineup, in other words, Johnson was in custody not because of the warrantless arrest but because of the magistrate's probable cause determination. It is because of that crucial fact that this Court itself has cited Johnson as an example of an "intervening circumstance" that attenuated an alleged fruit. Brown v. Illinois, 422 U.S. at 603-604. Here,

however, the allegedly intervening circumstances which the government contends are comparable to the magistrate's order in Johnson, were, as the court below pointed out, themselves "afflicted with the very infirmity [they are] supposed to prevent -- i.e., the taint of an arrest without probable cause -- . . ." Petition at 43a. Thus it would be absurdly self defeating to accord them any attenuating significance.

Johnson is also distinguishable because it deals with substantially less flagrant police misconduct -- indeed, arguably with no misconduct at all. The police there had probable cause to arrest for crime A and there is no suggestion that they thought that by arresting Johnson without a warrant they could secure identification testimony in case B. In this case, the record shows that the illegality -- an arrest for investigation without probable cause -- was perpetrated for the very purpose of obtaining the fruit -- identification evidence -- now in dispute.

The court below also rejected the contention which the government made there and repeats in its petition here that because the witness was clearly "willing" to testify at trial that alone serves to attenuate the fruit from the official police misconduct. Petitioner's argument attempts to draw a parallel between this case and Ceccolini, where this Court found the witness' willingness to testify an important (though not decisive) factor in determining the degree of attenuation. While we agree that the willingness of the witness to testify is a very significant factor where, as in Ceccolini, it is knowledge of the witness' existence or identity that is obtained as a result of the police illegality, that factor is simply beside the point in a case such as this, where it is the identification of the defendant by the witness that is the direct and intended fruit of the misconduct. This is because, as this Court pointed out in Ceccolini, where knowledge of the witnesses' existence or identity is uncovered as a result of a Fourth Amendment violation

it is reasonable to assume that,

[t]he greater the willingness of the witness to freely testify, the greater the likelihood that he or she will be discovered by legal means. And, concomitantly, the smaller the incentive to conduct an illegal search to discover the witness. . . . Witnesses can, and often do, come forward and offer evidence entirely of their own volition.

435 U.S. at 276. But, conversely, where, as in the instant case, the illegal seizure of the respondent was made for the very purpose of securing the challenged identifications, the police will have every incentive to continue to effect illegal investigatory arrests of precisely the sort made here unless, as the court below recognized, those identifications themselves are suppressed. Thus, as the court of appeals concluded, "the free will of the witness in the present case does not represent an attenuating, intervening force." Petition at 52a, n.37. This is certainly not a departure from Ceccolini, but merely a manifestly correct application of its rationale to a different set of facts.

Finally, and of "particular" importance, the Court of Appeals found that the illegality here was flagrant, and that its very purpose was to obtain the fruit now in issue. As that court aptly summarized:

The remarkable parallels to the offending police activity in Brown v. Illinois, supra, are noteworthy. In that case, as this,

[t]he impropriety of the arrest was obvious; awareness of that fact was virtually conceded by the two detectives when they repeatedly acknowledged, in their testimony, that the purpose of their action was 'for investigation' or for 'questioning.' . . . Petition at 48a.

The major difference is that while in Brown the objective of the misconduct was primarily to question the suspect -- hence statements were rightly suppressed -- here that objective was to secure the suspect's photograph for possible identification evidence that was correctly suppressed.

Because, then, the official misconduct here was so flagrant, and its purpose so inextricably bound with its fruits, we submit this was, as the court below found, a particularly appropriate case to reject the argument for attenuation and to apply the exclusionary rule to all the fruits of that misconduct.

The petitioner, perhaps sensing that its attenuation argument is unpersuasive, proceeds to take an even harder, but less defensible, line of attack, asking this Court to fashion a per se rule that a victim's identification testimony should never be treated as the fruit of police misconduct, not because such testimony is in fact never an unattenuated fruit of that misconduct, but because of "the manifest costs to society of disabling such witnesses." The assertion -- which is not really an argument at all -- is, of course, really no more, or less, than a broadside attack on the exclusionary rule because the "social costs" of suppressing them are too high. But even more important, the petitioner's position was effectively rejected by this Court just last term in Ceccolini, supra, and thus does not warrant further consideration by this Court.

In Ceccolini, the respondent-defendant argued that a witness' identity was learned as a result of police misconduct and thus that all of the witness' testimony should be excluded at trial. The government, on the other hand, contended that the live testimony of a witness at trial could never be the "fruit"

of police misconduct. The government's per se position was rejected:

An examination of these cases leads us to reject the Government's suggestion that we adopt what would in practice amount to a per se rule that the testimony of a live witness should not be excluded at trial no matter how close and proximate the connection between it and the Fourth Amendment. 435 U.S. at 274-275.

The Court then went on to determine whether, in the case before it, the trial testimony was in fact a fruit of the police misconduct.

Ceccolini, then, necessarily answers petitioner's contention here; for in the instant case the challenged fruit is not all the live testimony of a witness, as it allegedly was in Ceccolini, but only the witness' identification testimony. Under the Court of Appeals' ruling, it is only that portion of the witness' testimony that is excluded. By rejecting the government's argument for a per se rule in Ceccolini, this Court recognized that in some situations, at least, all of a witness' live testimony might be excludable as the fruit of an illegality. The Court of Appeals correctly concluded that on the facts before it, a portion of a live witnesses' testimony was just such a fruit.

The petitioner attempts to distinguish Ceccolini on the ground that here the "evidence" was known to the authorities prior to the illegality, while in Ceccolini the witness' identity did not become known until after the misconduct. If that analysis were correct, there would, of course, be no "fruit of the poisonous tree" issue here at all, for there would be an

independent, pre-existing source for it. The evidence in dispute is not, of course, the witness' identity, as it was in Ceccolini, but rather, the witness' identification testimony of the respondent as the assailant. That evidence did not materialize until after the police illegality, and was the direct and intended result of it. It is that evidence, not the testimony of the witness generally, that was excluded by the Court of Appeals. Indeed, the petitioner as much as acknowledges this point when it concedes that the witness' ability to identify her assailant acquired "prosecutive utility" only after the police illegally arrested the respondent and obtained his picture. It is that "prosecutive utility" that is the fruit which was properly excluded by the Court of Appeals.

In light of the clear implications of Ceccolini, there is no reason to tarry long over the petitioner's contention that in excluding live testimony the Court of Appeals' analysis was inconsistent with "this Court's disposition of several significantly analogous lines of cases"; for this Court was, of course, aware of those "lines of case" when it rejected a per se approach to such testimony in Ceccolini.

The first "line" that petitioner cites is that consisting solely of Frisbie v. Collins, 342 U.S. 519 (1952), and Ker v. Illinois, 119 U.S. 436 (1886). As the Court of Appeals carefully explained, those cases are inapposite. The petitioner-defendants in Frisbie and Ker were illegally arrested, and sought to block their criminal prosecutions altogether on that basis alone, arguing that it violated due process to prosecute a person after an illegal arrest. This Court rejected that contention in both cases. Respondent here, however, has never advanced such a claim, and the Court of Appeals' ruling is explicitly premised on the

continuing vitality of the Ker-Frisbie doctrine. We readily acknowledge that in this case, as frequently happens, a proper application of the exclusionary rule results in the Government having insufficient evidence to prosecute. That is a far cry, however, from the arguments propounded, and rejected, in Ker and Frisbie that an accused gains complete immunity from prosecution merely because his arrest was effected by police officers who did not have authority to arrest in the jurisdiction where they apprehended the defendant, and even though there was probable cause for the arrest, there were no direct or indirect fruit of the illegality, and the accused received a fair trial.

Surely petitioner grossly exaggerates the pertinence of Frisbie and Ker to this case when it contends that in both decisions the Court was "plainly of the view" that Fourth Amendment violations did not make inadmissible eyewitness testimony. In fact, Frisbie and Ker were decided before the exclusionary rule was made applicable to state prosecutions, see Mapp v. Ohio, 367 U.S. 643 (1961). Moreover, Ker specifically left open the question of whether a judicial sanction short of dismissal of the prosecution -- such as the sanction applied here -- would sometimes be appropriate where there had been an illegal arrest:

We do not intend to say that there may not be proceedings previous to trial, in regard to which the prisoner could invoke in some manner the provisions of this clause of the Constitution; . . . 119 U.S. at 440.

Finally, and decisively, Ceccolini clearly repudiates the broad reading of Ker-Frisbie which the government advances here.

Petitioner also cites Wade v. United States, 388 U.S. 218 (1967); Manson v. Brathwaite, 432 U.S. 98 (1977); and Neil v. Biggers, 409 U.S. 188 (1972), as supporting its argument for a per se rule with respect to live testimony. But as the court below explained, the "lynchpin" of those cases is the reliability of identification testimony, and the "independent source" test that has been expounded in connection with them is designed to insure reliable evidence that will promote the quality and fairness of criminal trials. In that vein this Court has eschewed broad exclusionary rules where that reliability could be assured through rules of more limited application. Manson, supra, 432 at 112. The touchstone of the Fourth Amendment exclusionary rule, on the other hand, is deterrence:

We have recently said, in a search and seizure context, that the exclusionary rule's 'prime purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures.' United States v. Calandra, 414 U.S. 338, 347 (1974). We then continued:

"The rule is calculated to prevent, not to repair. Its purpose is to deter -- to compel respect for the constitutional guaranty in the only effective available way -- by removing the incentive to disregard it." Elkins v. United States, 364 U.S. 206, 217 (1960). (footnote omitted).

Michigan v. Tucker, 417 U.S. 433, 446.

* * *

The primary justification for the exclusionary rule then is the deterrence of police conduct that violated Fourth Amendment rights. Stone v. Powell, 428 U.S. 465, 486 (1976).

Viewed from this deterrent perspective, it is clear that it is to precisely this sort of case -- one involving, as it did, purposeful police misconduct designed to obtain just the evidence sought to be suppressed -- that the exclusionary rule most logically should be applied. And, manifestly, the evidence suppressed must include all the identification testimony sought by the police misconduct, including the in-court identification. The government has yet to suggest a logical distinction between out-of-court and in-court identifications as potential fruits, and it is patently obvious that in this case to permit the government to profit from the intentional illegality by using an in-court identification would fatally undermine the deterrent rationale of the exclusionary rule.

It is true that the evidence suppressed was live testimony. But as this Court said in Ceccolini, such testimony, like any other evidence, may, depending on the facts, be a suppressible fruit of police misconduct. The court below simply applied the teachings of this Court diligently and intelligently to the unusual facts before it. Accordingly, the government's petition ^{4/} for certiorari should be denied.

Respectfully submitted,

Silas J. Wasserstrom
Silas J. Wasserstrom
Public Defender Service
451 Indiana Avenue, N.W.
Washington, D.C. 20001
628-1200

W. Gary Philman
W. Gary Philman
Public Defender Service
451 Indiana Avenue, N.W.
Washington, D.C. 20001
628-1200

^{4/} In a concluding footnote the petitioner suggests that because the Court of Appeals rejected its "inevitable discovery" argument this Court should grant review. Even petitioner concedes that at best that doctrine has the "apparent approval" of this Court. Petition at 20 n.11. The Court of Appeals assumed, arguendo, the doctrine's vitality and found that the government had not met its burden. Petition at 34a-35a. We submit that this finding is amply supported by the record, but at all events, any factual disagreement is surely not worthy of this Court's consideration.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Opposition
to Government's Petition for Writ of Certiorari has been served
by first class mail, postage prepaid, on the Office of the
Solicitor General, Department of Justice, Washington, D.C.
20530, this 9th day of January, 1979.


W. GARY KOHLMAN